Supreme Court, U.S.
FILED
JUL 3 0 2003
OFFICE OF THE CLERK

No. 03-10

In The
Supreme Court of the United States

LUIGINO'S, INC.,

Petitioner,

v.

IBP, INC. and ROBERT PETERSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RONALD J. SCHUTZ
Counsel of Record
EMMETT J. MCMAHON
RITA COYLE DEMEULES
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402-2015
Telephone: (612) 349-8500
Facsimile: (612) 339-4181
Attorneys for Respondents IBP, Inc. and Robert Peterson

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

QUESTIONS PRESENTED

1. Whether the decision by the Eighth Circuit Court of Appeals properly affirmed the grant of summary judgment on Petitioner's state law claims under the standards of this Court's 1986 trilogy *Celotex*, *Liberty Lobby*, and *Matsushita*, where the Petitioner failed to present evidence of genuine disputed facts on an issue for which it bore the burden of proof namely, causation?

2. Whether this Court should grant the Petition for Writ of Certiorari where this case involves only state law claims and no split among the federal circuit courts of appeals, simply to revisit the summary judgment standards set out in the 1986 trilogy *Celotex*, *Liberty Lobby*, and *Matsushita*?

RESPONDENTS' RULE 29.6 DISCLOSURE

Tyson Foods, Inc., a publicly held, Delaware corporation, owns ten percent or more of the stock of Respondent IBP, inc. Tyson Foods, Inc. is the only parent of IBP, inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RESPONDENTS' RULE 29.6 DISCLOSURE	ii
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
RELEVANT AUTHORITY INVOLVED	1
STATEMENT OF THE CASE	1
A. Factual Recitation	1
B. Procedural Posture	5
REASONS FOR DENYING THE WRIT	6
I. THE EIGHTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT WAS CONSISTENT WITH THE SUMMARY JUDGMENT STANDARDS OF *ANDERSON v. LIBERTY LOBBY; CELOTEX CORP. v. CATRETT;* AND *MATSUSHITA ELEC. INDUS. CO. LTD. v. ZENITH RADIO CORP.*	7
II. THE EIGHTH CIRCUIT'S DECISION AFFIRMING SUMMARY JUDGMENT ON THE ISSUE OF CAUSATION RAISES NO CONSTITUTIONAL ISSUE NOR A VALID SPLIT AMONG THE CIRCUITS, AND THEREFORE PRESENTS NO COMPELLING REASONS FOR GRANTING LUIGINO'S PETITION FOR CERTIORARI	12
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877 (8th Cir. 1978) 11

Aries Info. Sys., Inc. v. Pacific Mgmt. Sys. Corp., 366 N.W.2d 366 (Minn. Ct. App. 1985) 8

D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, New Jersey, 535 N.W.2d 671 (Minn. Ct. App. 1996) 8

Elias v. City of St. Paul, 350 N.W.2d 442 (Minn. Ct. App. 1984) 11

Handeen v. Lemaire, 112 F.3d 1339 (8th Cir. 1997) 16, 17

Hayes v. Douglas Dynamics, Inc., 8 F.3d 88 (1st Cir. 1993) 16

Luigino's Inc. v. IBP, Inc., 317 F.3d 909 (8th Cir. 2003) 6

Lake Harriet State Bank v. Venie, 165 N.W. 225 (Minn. 1917) 8

Moseley v. V Secret Catalogue, 537 U.S. 418, 123 S.Ct. 1115 (2003) 14

Nguyen v. Control Data Corp., 401 N.W.2d 101 (Minn. Ct. App. 1987) 8

Yee v. City of Escondido, 503 U.S. 519 (1992) 14

STATUTES AND RULES

Fed. R. Civ. P. 38 1

Supreme Court Rule 10 ..... 7, 16

U.S. Const. Amend. VII 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Gregory, One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment, 23 Florida St. Law Rev. 689, 692 (1996).....19

Issacharoff & Loewenstein, Second Thoughts About Summary Judgment, 100 Yale L.J. 73 (1990) 19

McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 Boston College Law Rev. 203, 247 (1993) 18, 19

Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments? 78 N.Y.U.L. Rev. 982, 1006 (2003).....18, 19, 20

Stempel, A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process, 49 Ohio State Law Journal 95, 135 (1988).....17, 18

Note, Summary Judgment and Circumstantial Evidence, 40 Stanford Law Review 491, 492-93 (1988).....18

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court in an opinion issued on January 30, 2003. The Court of Appeals denied Petitioner's Petition for Rehearing on April 1, 2003. The Petition for Writ of Certiorari was docketed in this Court on June 30, 2003.

RELEVANT AUTHORITY INVOLVED

Petitioner lists the Seventh Amendment to the Constitution, U.S. Const. Amend. VII, and the procedural requirement for a jury trial demand, Fed. R. Civ. P. 38 (a), as relevant authority. Petitioner's Br. at 2. However, neither provision was raised before the Court of Appeals for the Eighth Circuit or the District Court for the District of Minnesota as a basis for denying Respondents' Motion for Summary Judgment.

STATEMENT OF THE CASE

A. Factual Recitation.

Respondent IBP, inc. was, during the time of the proceedings in the District Court, a publicly held company with national and international operations in beef processing and distribution. IBP also had subsidiary operations in major segments of the frozen food industry, including manufacturing, distribution, and retail sales. One of IBP's

subsidiaries, Specialty Brands, Inc. ("SBI")[1], was a manufacturer and distributor of frozen Mexican foods that operated six manufacturing plants throughout the United States, one of which alone had the capability of producing more than 1.2 million burritos per day. Since at least 1995 – more than two years before representatives of IBP and Petitioner Luigino's first met to discuss possible acquisition terms – SBI had offered four different brands of frozen Mexican foods that were sold at retail in convenience stores, warehouse club stores, and grocery stores under the labels *Butcher Boy*, *Posada*, *Little Juan*, and *Marquez*. The undisputed evidence below showed that Luigino's top officers – including among others its President and its Vice President of Research and Development – acquired and sampled SBI's frozen Mexican food products at various times between 1996 and 1999, were aware that SBI was a subsidiary of IBP, and were aware that the acquired and sampled products were sold in retail settings. In fact, to the extent Petitioner describes the evidence of record below otherwise, *see* Petition at 14, it is wrong. The evidence of Luigino's purchases, samplings, and knowledge of SBI, its products, and the presence of those products in consumer retail markets was uncontroverted.

Long before Luigino's sent offering materials on the company to IBP, SBI decided in 1995 to embark upon a plan to consolidate its four brands for frozen Mexican

---

[1] SBI was actually a subsidiary of Foodbrands America, Inc., which after 1996 was a subsidiary of IBP. Foodbrands operated as an autonomous subsidiary of IBP, updating IBP from time to time on all of the Foodbrands' operations. No SBI employee reported to anyone at IBP.

burritos, enchiladas, fajitas, chimichangas, and other Mexican food items into one single umbrella brand with stronger consumer recognition. Between 1997 and 1999, SBI continuously worked toward the goal of developing and launching this single, consolidated frozen Mexican food label by hiring employees with relevant experience in the frozen food industry, by conducting market research, and by preparing a comprehensive 10-chapter marketing plan. SBI's on-going independent development efforts on the unified brand for frozen Mexican foods were undertaken without considering any information from or on Luigino's.

Because IBP and its subsidiary operations participated in the food industry, when IBP and Luigino's representatives first met in 1998 to discuss Luigino's plan to sell the company, it was under the auspices of a Confidentiality Agreement. That agreement defined "confidential information" so as to specifically exclude from its purview "information developed independently by [IBP] employees who are not privy to" the disclosed information. Thus, from the outset of discussions between the companies, Luigino's recognized that IBP was in the food business and was developing products.

None of the materials exchanged between Luigino's and IBP in 1998 under this Confidentiality Agreement made mention of frozen Mexican food products. Nor was this omission of a particular ethnic food category a surprise. The record presented to the District Court was replete with undisputed facts on Luigino's explicit and unequivocal rejection, on several occasions, of a Mexican frozen food line. App. 37a. The record below was also laden with undisputed evidence of the complete distinction that

Luigino's drew between the Mexican and Southwestern food categories. App. 22a.

Discussions between the companies proceeded to the point in mid-1998 where IBP made an offer to acquire Luigino's, which was rejected with some scorn by Mr. Paulucci. Nevertheless, when Mr. Paulucci set out in late 1998 to comply with the requirement of the company's bondholders to establish a Board of Directors, he requested that Mr. Peterson join that newly-formed Board. In this manner, Mr. Paulucci could continue to market Luigino's to IBP. App. 3a. After accepting the directorship, Mr. Peterson completed a questionnaire needed for Luigino's bond offering. In that questionnaire, Mr. Peterson accurately stated that he did not regard IBP's food products as "competitive" with Luigino's, but explained that "IBP and its subsidiaries manufacture food products, however, none of these products directly compete" with Luigino's products. App. 19a.

Mr. Peterson attended three Luigino's Board meetings: April, 1999; July, 1999; and November, 1999. He never attended another Luigino's Board meeting, nor acted in any Board member capacity after 1999. Several Luigino's officers, employees, and representatives who attended one or more of the Board meetings at which Mr. Peterson was present were aware of IBP's presence in the frozen food retail market. *Howlin' Coyote*, a line of southwestern frozen chilies and salsas that Luigino's acquired in January 1999, was mentioned in the Board meeting minutes just once. As the District Court below found, any claim that a presentation was made to the Board of Directors on *Howlin' Coyote* or any plans to introduce a line of premium, frozen Southwestern (not Mexican) food under the *Howlin' Coyote* label was "dim" testimony or non-existent.

App. 20a. In fact, the evidence presented to the lower courts showed the *Howlin' Coyote* Business Plan was never shared with Luigino's Board of Directors. There was also no evidence that any information from the Board meetings was passed from Mr. Peterson to anyone at either Foodbrands or SBI.

By January, 2000 Mr. Paulucci had decided he was not going to "push[ ]" *Howlin' Coyote* that year because of a reluctance to spend the money on slotting fees. App. 23a. The first time Mr. Peterson learned of SBI's new umbrella brand, *José Olé*, was in February, 2000 when SBI presented a request for approval of capital expenditure to the IBP Board of Directors. App. 22a. SBI thereafter announced the launch of *José Olé* in April 2000. Twenty-one (21) of the twenty-six (26) products in the *José Olé* line are hand-held Mexican frozen foods such as those found in SBI's predecessor lines. The only new product offerings were five frozen food items packaged in bowls, a concept that was hardly new in the frozen food industry in 2000. Shortly after SBI launched the *José Olé* line in the retail foods marketplace, Nestle launched a new line of *Ortega* frozen Mexican food products. In June, 2000, in the face of advertising campaigns mounted by SBI and Nestle, Luigino's elected to pull *Howlin' Coyote* from the market. App. 23a.

B. Procedural Posture.

Luigino's filed its Complaint in July, 2000, asserting claims for breach of contract, breach of fiduciary duty, constructive trust, and misappropriation of trade secrets, all under Minnesota law. The District Court denied Luigino's Motion for a Preliminary Injunction in December, 2000. A

claim for negligent misrepresentation was thereafter added by amendment in 2001. The parties moved for summary judgment before the District Court in August, 2001. The District Court denied Luigino's Motion for Summary Judgment and granted IBP's Motion for Summary Judgment in an Order dated January 28, 2002. Luigino's took a timely appeal of that Order and Final Judgment to the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court in an Order dated January 30, 2003. The Eighth Circuit denied Luigino's Petition for Rehearing by Order dated April 1, 2003.

REASONS FOR DENYING THE WRIT

This case presents no decision of the Eighth Circuit Court of Appeals that is in conflict with the decision of another circuit court of appeals on an important matter. Indeed, the Eighth Circuit Court of Appeals panel reached its unanimous decision by relying only on and citing to decisions from that circuit or from Minnesota state courts. *See Luigino's Inc. v. IBP, inc.*, 317 F.3d 909 (8th Cir. 2003). No decisions from other circuits were cited in that opinion, let alone distinguished to support the unanimous outcome. Nor is there any important decision on a matter of federal law. In the end, this case is simply about whether the lower courts properly applied the Rule 56 summary judgment standard. That question is easily answered in the affirmative, particularly given the District Court's "extensive review of the record" in order to determine that summary judgment was "wholly appropriate." App. 41a. Petitioner's assertion that summary judgment was used improperly because factual disputes existed is both incorrect

and not the type of "compelling reasons" that justifies granting a Petition for Writ of Certiorari. Rather, this Petition falls squarely within the category of cases for which certiorari is rightly denied. Sup. Ct. Rule 10.

I. THE EIGHTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT WAS CONSISTENT WITH THE SUMMARY JUDGMENT STANDARDS OF *ANDERSON v. LIBERTY LOBBY; CELOTEX CORP. v. CATRETT*; AND *MATSUSHITA ELEC. INDUS. CO. LTD. v. ZENITH RADIO CORP.*

It is telling that Luigino's does not mention the specific basis for the lower courts' summary judgment ruling before page 13 of its Petition. Not once in the Questions Presented or Statement of the Case does Luigino's acknowledge that the basis on which the District Court granted summary judgment to IBP, and the Eighth Circuit Court of Appeals affirmed that judgment, was the absence of any evidence showing causation. As the District Court summarized, Luigino's failed "to assert facts that could support a finding of a causal link between any alleged impropriety and alleged damages. . . . The crucial facts of causation are fatally omitted from Plaintiff's case[.]" App. 40a-41a. The Eighth Circuit agreed: " . . . Luigino's failure to establish a genuine issue of material fact regarding causation defeats all of its claims." App. 9a.[2]

[2] In this respect, Luigino's does not accurately represent the basis for the appellate court's decision when it paraphrases that ruling in a fashion that fails to mention that the Court concluded after review of

(Continued on following page)

Thus, the sole basis on which summary judgment was granted on Luigino's state law claims was causation – an element that Minnesota law has long held is the plaintiff's burden to prove. *D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, New Jersey*, 535 N.W.2d 671, 675 (Minn. Ct. App. 1996) (plaintiff must show that contract breach was proximate cause of damages); *Aries Info. Sys., Inc. v. Pacific Mgmt. Sys. Corp.*, 366 N.W.2d 366, 369 (Minn. Ct. App. 1985) (same – trade secret misappropriation); *Nguyen v. Control Data Corp.*, 401 N.W.2d 101, 106 (Minn. Ct. App. 1987) (same – misrepresentation claim); *Lake Harriet State Bank v. Venie*, 165 N.W. 225, 228 (Minn. 1917) (same – breach of fiduciary duty claim). Even before the parties reached the District Court on IBP's Motion for Summary Judgment, that court identified a potential evidentiary void that could impede Luigino's ability to succeed on this fundamental element for each of Lugino's claims. In denying Luigino's Motion for a Preliminary Injunction (brought one year before the summary judgment motions), the District Court noted that "other factors" such as other competitors or Luigino's own business decisions could be the legal cause of any impact on Luigino's product lines. December 13, 2000 Order at 13.

One year later, when the parties returned to the District Court after completing a host of depositions, written discovery, and expert disclosures, IBP presented a record of undisputed facts drawn from the testimony of Luigino's witnesses and Luigino's documents that confirmed Luigino's had lost sales since the introduction of

---

the record that Luigino's claims failed "for lack of causation[.]" *Compare* App.4a *with* Luigino's Petition at 7.

José Olé due to other products – newly introduced products and existing products in the marketplace – as well as Luigino's own business decisions. Among other undisputed facts, both Mr. Paulucci and Luigino's Executive Vice-President of Sales admitted in deposition testimony that product sales had been lost to products other than *José Olé*. Thus, the earlier potential evidentiary void became reality given that there was no evidence that any of IBP's conduct in bringing *José Olé* to market was the cause of any marketplace failure of Luigino's products. Each step of the way, the lower courts properly took facts and inferences in Luigino's favor but found this evidentiary void could not be filled. There was, for example, no evidence that IBP used any of the information Luigino's designated as "confidential," even where the lower courts considered the confidentiality issue in a light most favorable to Luigino's. App. 5a, 7a. The District Court also assumed that even where "Luigino's arguably knowingly and voluntarily facilitated" the alleged breach of contract, which in itself "created an issue of fact," even that dispute did not preclude summary judgment because the fundamental legal issue Luigino's failed to "address [was] a crucial element to its claim – an alleged causal link between the alleged breach and damages." *Id.* at 40a. Further, even accepting as true the existence of "superficial similarities" between the products, the lower courts recognized there was no evidence that those similarities existed "because IBP was exposed to confidential Luigino's information." App. 7a. In short, knowing the District Court's concern about the possible effect on Luigino's products of various unrelated factors, Luigino's presented no evidence that would have quantified the impact of those factors or distinguished the impact of those factors from any other causes for lost sales.

In addition to barely acknowledging the basis for the summary judgment ruling below, nowhere in its Petition does Luigino's point to *disputed facts* that could support a finding that its burden on causation could be met. Luigino's does not, for example, explain how Respondent Peterson's "state of mind" could be relevant to the issue of causation. Pet. Br. at 15.[3] Rather, Luigino's engages in the irrelevant exercise of illustrating alleged conflicts between the testimony of Mr. Peterson and the testimony of IBP's CFO as to whether Mr. Peterson told Mr. Shipley "about Luigino's *Howlin' Coyote* line," and thereafter describing the possible credibility assessments that could accompany this type of conflict – "demeanor and physical movements." Petition at 4. This is a wasted exercise because neither the "dispute" nor the "credibility" issues would support Luigino's burden on causation. Moreover, the District Court did, in fact, address this alleged "actual dispute" concisely and properly: "The only evidence Plaintiff points to is deposition testimony of Larry Shipley that states that Peterson told Shipley that Luigino's purchased *Howlin' Coyote*. As a matter of law, this communication, without more, however, is not a trade secret and cannot support an inference that Peterson somehow misappropriated certain proprietary information." App. 33a. In short, regardless of the credibility issues that Luigino's claims the difference in recollection between Mr. Peterson and Mr. Shipley generates, there is nothing in that scenario that could

[3] This omission is surprising in light of Luigino's characterization of Mr. Peterson's state of mind as "the case's central issue." Pet. Br. at 28. Surely if Mr. Peterson's state of mind was the sole basis on which Luigino's relies for causation, it could explain concisely how that "central issue" could be the *legal cause* of Luigino's damages.

have served as a platform for a reasonable jury to find in Luigino's favor on causation. For this reason, the District Court recognized after "extensive review" of the record that Luigino's failed to present undisputed facts identifying "which information was used, how it was used, and what circumstantial evidence within the *José Olé* line serves to indicate either[.]" App. 34a.

Longstanding, controlling law in Minnesota and the Eighth Circuit – predating even this Court's decisions in *Celotex*, *Liberty Lobby,* and *Matsushita* – recognizes that causation is a legal issue on which judgment can be entered as a matter of law. *See Elias v. City of St. Paul*, 350 N.W.2d 442 (Minn. Ct. App. 1984) (when plaintiff's evidence requires speculation as to causation, directed verdict is appropriate); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 895 (8th Cir. 1978) (directed verdict proper when testimony "was inadequate to provide anything more than a speculation as to the causation of plaintiff's alleged injury"). Here, the District Court and the Eighth Circuit Court of Appeals understood the relevant summary judgment standard, applied that standard by taking facts and inferences in Luigino's favor, and determined that Luigino's claims still failed as a matter of law on the legal issue of causation. App. 39a-40a.

Luigino's effort to match the outcome of this case to what it casts as the dire predictions of Justice Brennan's dissents in *Anderson* and *Celotex* is a misguided effort driven by inaccurate overgeneralizations. This case is not Justice Brennan's predictions come to life, nor is it a "classic example of judicial weighing of circumstantial evidence." Petition at 10, 13. The record presented to the District Court on IBP's Motion for Summary Judgment, hardly one of "little evidence," Petition at 10, was filled with

the admissions of Luigino's sales representatives, of the deposition testimony of Luigino's witnesses, and of Luigino's expert (who admitted he made no effort to quantify the effect on Luigino's sales of any factor other than *José Olé*) on multiple causes for Luigino's lost sales that had nothing to do with SBI, *José Olé*, or Mr. Peterson's short-lived tenure on Luigino's Board of Directors. Based on this evidence, and many other undisputed admissions by Luigino's, the district court correctly determined that summary judgment on Luigino's claims was "wholly appropriate" on just one crucial but fundamental issue: causation.

II. THE EIGHTH CIRCUIT'S DECISION AFFIRMING SUMMARY JUDGMENT ON THE ISSUE OF CAUSATION RAISES NO CONSTITUTIONAL ISSUE NOR A VALID SPLIT AMONG THE CIRCUITS, AND THEREFORE PRESENTS NO COMPELLING REASONS FOR GRANTING LUIGINO'S PETITION FOR CERTIORARI.

Luigino's Petition for Certiorari rests largely on an unfounded and misplaced attack on the work of the federal judiciary. Indeed, Luigino's denigrates the work of the federal judiciary in general, and the district court and the Eighth Circuit Court of Appeals in particular, when it characterizes decisions granting summary judgment as "paying lip service to the principles articulated" in this Court's 1986 trilogy of cases, as engaging in "activities that violate the 1986 trilogy," and as operating "in complete disarray and discord." Petition at 8, 10. This attack includes the overwrought generalization that "certain district courts and courts of appeals have flatly failed to apply" the trilogy's mandate and that lower courts employ

"an overly aggressive application" of the 1986 trilogy. *Id.* at 8, 27. This challenge is unwarranted, is inaccurate, and does not compel granting the Petition in this case. The record available to the District Court and the Eighth Circuit Court of Appeals was comprehensive, was the subject of extensive briefing (including a Petition for Rehearing to the appellate court), and was argued thoroughly before each court by competent counsel. Based on the record presented, both the District Court and an experienced panel of the United States Court of Appeals for the Eighth Circuit concluded that Luigino's presented no admissible evidence demonstrating a causal link between Mr. Peterson's brief tenure on Luigino's Board of Directors and any alleged harm Luigino's suffered as a result of the introduction of a frozen Mexican food line by a subsidiary of IBP. App. 5a-8a. The Panel's decision affirmed the District Court's decision on all of Luigino's claims – not on any disputed issues of intent or state of mind, but on the evidence or lack thereof on the element of causation. Luigino's claims failed because of an evidentiary deficiency on an element for which Luigino's alone bore the burden of proof but offered no evidence. The lower courts' opinions confirm that this case was precisely the type to which the Rule 56 summary judgment procedure was properly applied.

In arguing that summary judgment was used improperly here, Luigino's resorts to arguments and theories that were not advanced below. Not once below did Luigino's raise an issue regarding any alleged violation of the Seventh Amendment or Fed. R. Civ. P. 38. Not once below did Luigino's argue that a reasonable jury could find in its favor *on the issue of causation* based on evidence of alleged "past similar acts." Petition at 15. Indeed, Luigino's does

not explain even now how this inadmissible evidence from unrelated cases involving unrelated parties and unrelated products, even if plausibly characterized as genuine, material factual disputes, would allow a reasonable jury to find the requisite causal link between the alleged "bad acts" in this case and Luigino's alleged damages.

Next, in an effort to show a circuit split, Luigino's identifies two types of alleged inconsistencies within the circuits. First, Luigino's points to decisions from the Third and Sixth Circuits which upheld summary judgment for a defendant, in comparison to a decision from the Fifth Circuit, which reversed a summary judgment ruling for a defendant. Petition at 10-12. Second, Luigino's argues that the Eighth Circuit's decision is in conflict with the decisions of other circuits because the Eighth Circuit "did not correct the errors of the district court." Petition at 25. Neither of Luigino's scenarios is in fact a "circuit split," and neither scenario warrants granting the Petition in this case.

First, the fact that the circuit courts of appeals reach different outcomes in appeals from summary judgment rulings in different cases involving divergent claims (Section 1983 claim, vs. Jones Act claim, vs. fraud claim) with completely different factual records hardly rises to the level of a "circuit conflict." A circuit split warranting this Court's resolution is more often found in a difference in outcome based on differing views of the proper application of the same substantive law to similar facts. *See, e.g.*, *Moseley v. V Secret Catalogue*, 537 U.S. 418, 123 S.Ct. 1115, 1122 (2003) (granting certiorari to resolve circuit split on whether federal dilution claim requires evidence of actual harm); *Yee v. City of Escondido*, 503 U.S. 519, 536-37 (1992) (certiorari granted to address conflict between

federal circuit courts and state appellate court on application of Takings Clause to certain mobile home values). In other words, when this Court decides to grant certiorari in the case of a circuit split, it is to address different outcomes in cases involving the same claim and similar facts. The circuit split Luigino's envisions, however, is nothing more than different outcomes – primarily one with which Luigino's disagrees – in cases involving wholly unrelated claims and completely disparate facts.

More importantly, Luigino's presents this supposed circuit split based on no more than its assessment that the Third and Sixth Circuit cases were wrongly decided because the appellate courts upheld the summary judgment ruling, while the Fifth Circuit case was properly decided because that court reversed the summary judgment ruling. *See also* Petition at 25 (citing reversals of summary judgment rulings in favor of defendants due to misallocation of burden, or other alleged violations of summary judgment standards). Luigino's reaches these conclusions without the benefit of the complete record that was available to those courts, yet confidently announces the supposed legal errors or proper legal analysis drawn from those records. Petition at 11-12. At bottom, however, in the absence of a full review of the record, Luigino's assessment of which case was decided rightly or wrongly amounts to no more than a philosophical disagreement with the outcome when summary judgment is granted to defendants.

Second, Luigino's conclusion that a circuit split exists because it believes the Eighth Circuit failed to correct the lower court's errors (in contrast, apparently, to other circuit decisions which Luigino's concludes do correct errors) cannot be the definition of a circuit split. If Luigino's definition was

the correct statement of a circuit split, then virtually every decision with which the Petitioner disagreed would present this Court with a "circuit split." Rarely does the Petitioner concede that the lower appellate court ruling reflects something other than a failure to correct errors. Moreover, an alleged failure to correct errors is the type of case this Court deems "rarely" appropriate for a grant of certiorari. Sup. Ct. Rule 10. In addition, even if Luigino's form of analysis is correct, it appears the Eighth Circuit's decision was consistent with at least the First Circuit's decision in *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88 (1st Cir. 1993). The *Hayes* decision, which Luigino's cites, also affirmed summary judgment on a causation issue. *Id.* Thus, even if an alleged failure to correct errors is a valid basis on which to position a "circuit split," in fact here there is no split on the one substantive issue present in this case: causation.

Finally, a circuit split cannot be predicated simply on which party, plaintiff or defendant, prevails. It is interesting to note, however, that Luigino's does not identify a summary judgment ruling for a defendant, dismissing a plaintiff's claims, that Luigino's believes was properly decided. Certainly a circuit split cannot be predicated simply on whether or not the outcome favors the plaintiff or defendant, *see* Petition at 25, yet this is apparently the form of analysis that Luigino's promotes.

Nor is there an intra-circuit conflict within the Eighth Circuit, as Luigino's suggests. Petition at 14. The Eighth Circuit's decision in *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997) cannot conflict with its decision upholding summary judgment on Luigino's claims in this case because the *Handeen* panel rested its decision on the movant's failure to present, at the outset, a *prima facie*

case that would warrant summary judgment. *Id.* at 1345-46. In other words, summary judgment could not be granted in *Handeen* even though the non-movant did not present a credible record of disputed facts because the movant "failed to meet the prefatory burden contemplated by Rule 56." *Id.* at 1346. This was not the record presented to the District Court here, nor available to the Eighth Circuit on appeal. Rather, as the opinions of both lower courts demonstrate, an active review of the record was undertaken to confirm that the Rule 56 standard for summary judgment was met.[4] *See* App. 4a-5a (considering claim of confidential information under more than one claim); App. 25a-40a (addressing each claim individually); App. 31a-32a (taking facts on trade secret claim in Luigino's favor).

Finally, no circuit split nor the "compelling reasons" required to grant a petition for certiorari can be predicated on the law review articles on which Luigino's relies. Even these commentators, including counsel on this Petition Arthur Miller, recognize that the summary judgment procedure is properly applied where a case lacks merit (as did Luigino's), where a dispositive issue is legal (as was the issue of causation here), or where the material facts were uncontroverted (as were the material facts on causation here). *See, e.g.*, Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49

[4] The district court in particular faced the challenge of perusing a "dense and complex" record only to find that Luigino's record citations were in fact not to be found in the record. *See, e.g.*, App. 16a at note 3; and, App. 20a at note 4.

Ohio State Law Journal 95, 135 (1988) (recognizing in historical overview of summary judgment procedure that Committee Reporter and "prime author" Clark "viewed rule 56 summary judgment as a device for adjudicating cases without trial when the material facts were not contested by either party to the dispute."); *Id.* at 140 ("To Clark, summary judgment is designed to eliminate cases in which the claimant 'has no case at all'[.]"); *Id.* at 192 (recognizing that summary judgment can be properly employed where non-movant's "case is so clearly non-meritorious that no reasonable fact finder would render a decision in its favor."); Note, *Summary Judgment and Circumstantial Evidence*, 40 Stanford Law Review 491, 492-93 (1988) (pointing out that alternative reading of *Matsushita* presents clear picture of judge and jury roles, and is consistent with opinion in *Anderson*); *Id.* at 512 (acknowledging that *Matsushita* holding recognizes that "the mere fact that an inference may be more probable than not is not enough to render the inference permissible."); *Id.* at 515 (recognizing that taking into account standard of proof is not the equivalent of weighing credibility); McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 Boston College Law Rev. 203, 247 (1993) (acknowledging that summary judgment is properly granted where the movant presents more than "mere assertions" and non-movant responds with "insufficient evidence for a reasonable jury to find in its favor.") (hereafter McGinley, *Credulous Courts*); Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U.L. Rev. 982, 1006 (2003) (acknowledging that Rule 16 is equivalent of "partial summary judgment" since district courts can dispose of

"frivolous claims in the course of a pretrial conference"); *Id.* at 1018 (acknowledging historical role of summary judgment in "clear-cut cases"); *Id.* at 1019 (acknowledging Supreme Court decision in 1902 that recognized validity of summary judgment procedure where "no disputed material facts and therefore no triable issues"); *Id.* at 1075 (acknowledging that no questions of "constitutional dimensions" are present where no genuine issue of material facts exists and movant is entitled to judgment as a matter of law); *Id.* at 1091 (acknowledging that summary judgment procedure reflects "a certain degree of tolerance for judicial control of the jury."); *Id.* at 1127 ("questions of law are the domain of judges and are admirably suited to resolution by pretrial motion.") (hereafter Miller, *Pretrial Rush*).

Furthermore, these law review commentators offer solutions to the problems they perceive to exist that are case-specific and therefore irrelevant here, or they offer no solutions at all. For example, one author recognizes only that the 1986 trilogy of summary judgment decisions requires "a concomitant reduction in the use of the Rule 50 procedures." Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 Florida St. Law Rev. 689, 692 (1996); *Id.* at 710 (proposing modifications to Rule 50 practice). *See also* McGinley, *Credulous Courts*, at 209 (arguing that proper application of the summary judgment standard under the 1986 trilogy must take into account proper application of the *McDonnell Douglas* standard for discrimination cases); *Id.* at 243-255 (providing examples of revised standard for *McDonnell Douglas* in light of proper application of summary judgment standard); Issacharoff & Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73

(1990) (analysis of economic incentives for summary judgment).

Counsel on this Petition Miller argues that this Court "must provide some clarity" on summary judgment practice, Miller, *Pretrial Rush* at 1134, however does not explain in terms relevant to this case what that clarity would be and how that clarity would assist in not only this case but all other cases presenting a record of undisputed facts on the legal issue of causation. Even counsel Miller implicitly acknowledges that any after-the-fact analysis of the outcome of a summary judgment motion rests at some level of speculation. *See Id.* at 1097 ("appears" to have compromised jury trial right, motion "suggests" subject was trial worthy); *Id.* at 1098 (noting that the judge "probably sens[ed] difficulty" with the allocation undertaken); *Id.* at 1127 (noting that reader will have to "draw his or her own conclusions about the results" in the described cases). Speculation cannot, however, drive this Court's decision on a Petition for Writ of Certiorari.

Even if the speculative assumptions of these commentators could provide the basis for a grant of certiorari, nowhere has Luigino's demonstrated that those types of assumptions drove the lower courts' opinions here. Indeed, given the uncontroverted record before the lower courts, there is simply nothing in these articles that suggests the outcome in this case would have been any different even if the commentators' proposals were implemented or their assumptions were granted validity. Luigino's effort to align this case with the views of those who disagree with this Court's decisions in *Anderson*, *Celotex*, and *Matsushita* is a mismatched effort. The lower courts reached the correct outcome on the record

evidence. No amount of commentary on the 1986 trilogy of cases will change that outcome.

CONCLUSION

On the whole of the record, it is clear that this is not a case that warrants this Court's grant of a Petition for Certiorari. The Panel did not improperly weigh evidence or construe inferences against Luigino's. Rather, a thorough review of the claims and the record presented to the District Court and the Eighth Circuit Court of Appeals demonstrated a complete lack of evidence on a dispositive element on which Luigino's bore the burden of proof: causation. The lower courts followed this Court's 1986 trilogy of summary judgment decisions and reached the proper outcome on the record before it. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI, L.L.P.
RONALD J. SCHUTZ
Counsel of Record
EMMETT J. MCMAHON
RITA COYLE DEMEULES
800 LaSalle Avenue, Suite 2800
Minneapolis, MN 55402-2015
Telephone: 612-349-8500
Facsimile: 612-339-4181

July 30, 2003